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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1420

JOSEPH F. YOUNG,
Petitioner,

v.

ADA M. SCOTT, for herself, her daughter JACQUELINE A. SCOTT, an infant, and for others similarly situated,

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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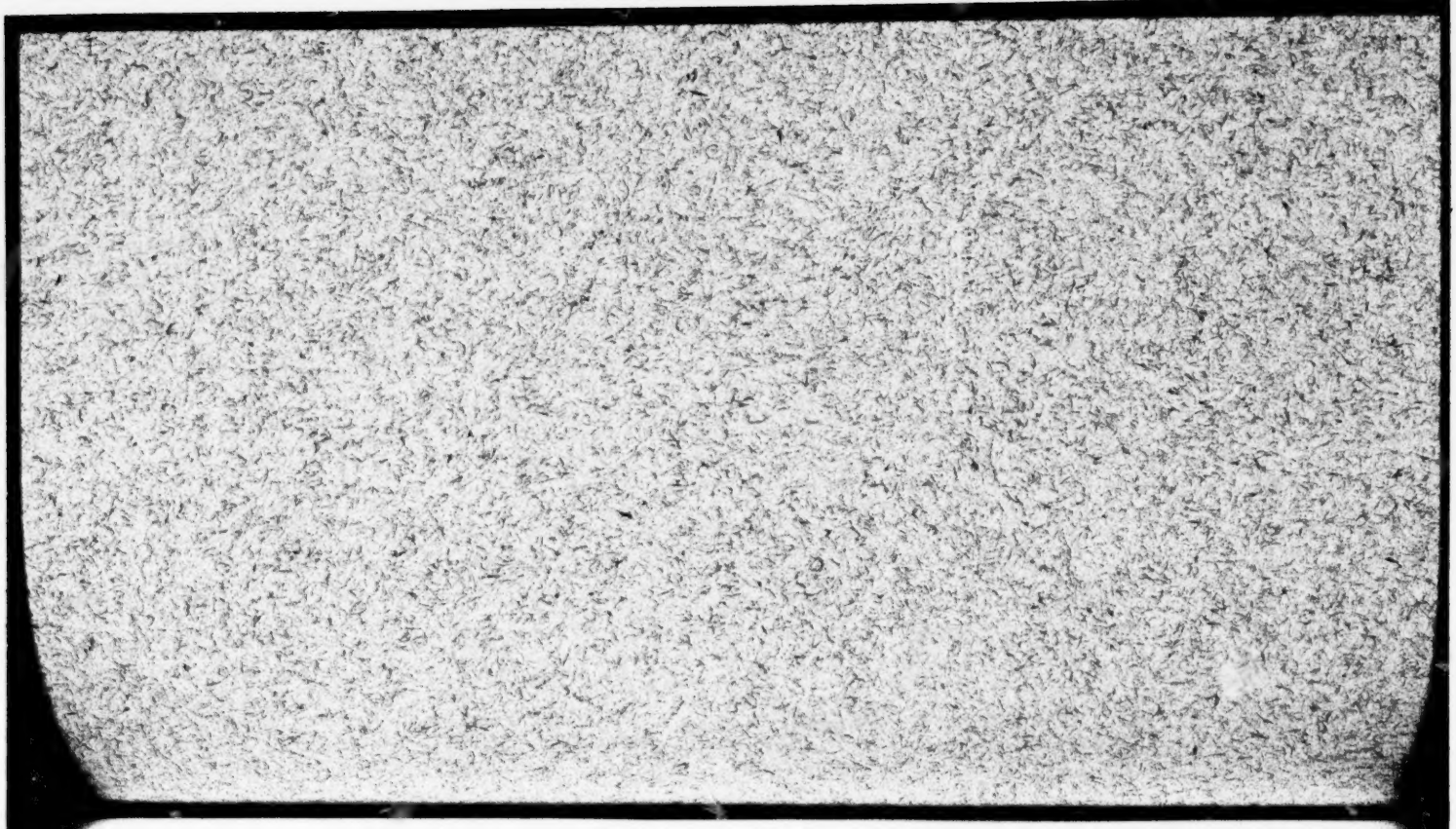

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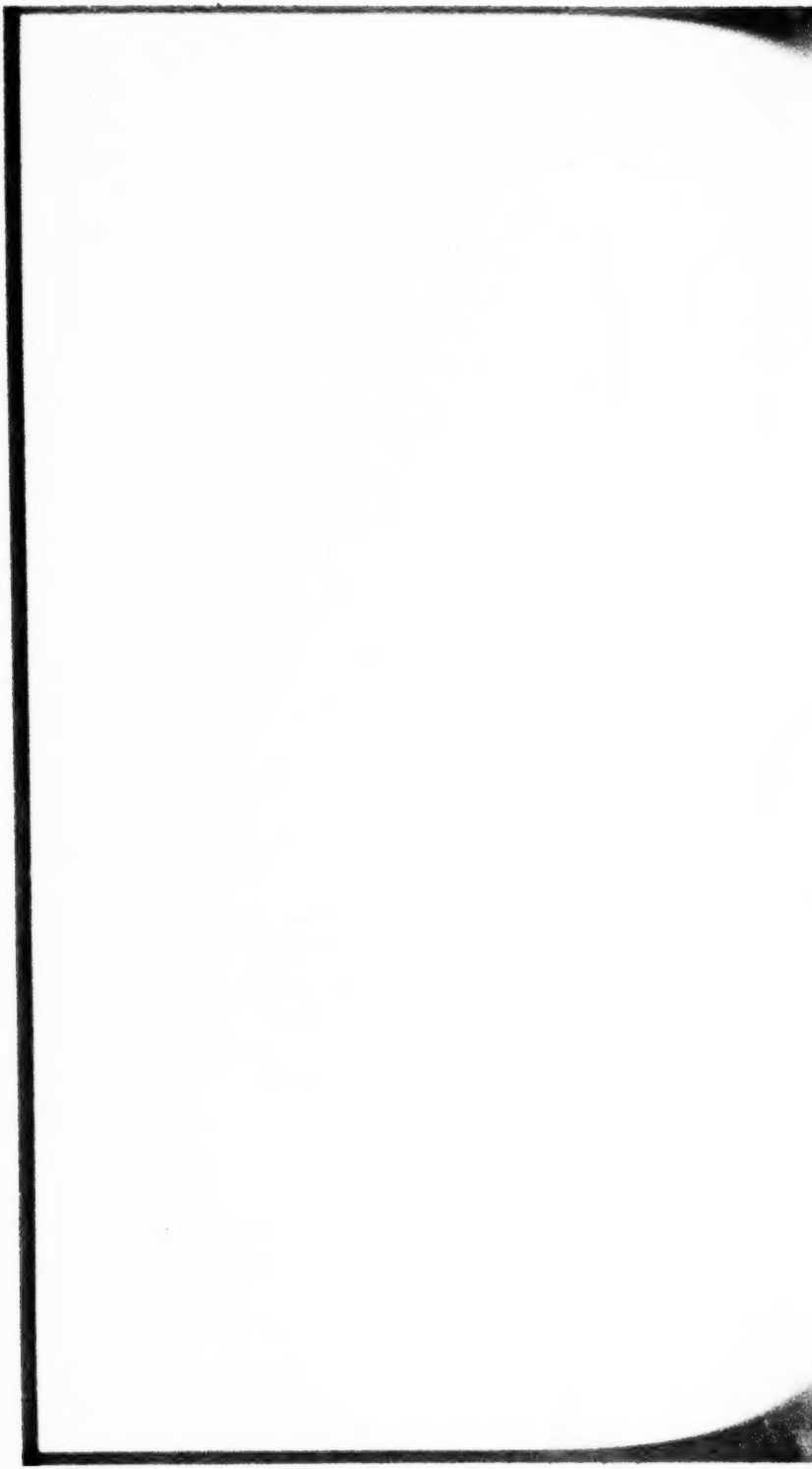

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IN THE

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OCTOBER TERM, 1969

No. ———

JOSEPH F. YOUNG,
Petitioner,

v.

ADA M. SCOTT, ET AL., and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray the issuance of a writ of certiorari to review a ruling of the United States Court of Appeals for the Fourth Circuit—affirming a holding of the United States District Court for the Eastern District of Virginia—that (a) non-discrimination in all forms of private contracting is required by the 1866 Civil Rights Act and (b) picnickers engaged in 'sunbathing and girl watching' at a 23 acre private park in the Fairfax woods are "sources of entertainment which move in commerce" within the meaning of the 1964 Civil Rights Act.

OPINIONS BELOW

The case was originally disposed of by a consent decree on December 5, 1966 and no opinion was issued. This decree appears in the Appendix at page 1a.

The opinion of the District Court following the revival of the case in 1968 is not officially reported. It is printed, together with the Order entered thereon in the Appendix starting at page 4a.

The opinion of the United States Court of Appeals for the Fourth Circuit has not been officially reported, and is appended hereto at page 12a. The order of the Circuit for the reversal of which this application is submitted, is included at page 17a.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered January 16, 1970.

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (28 U.S.C. § 1254).

QUESTIONS PRESENTED

1. Is non-discrimination required in every private commercial transaction by reason of the "right to make and enforce contracts" phrase of the Civil Rights Act of 1866 (42 U.S.C. 1981)?

2. Is the Fairfax picnic lake here in question a 'place of entertainment' 'affecting commerce' within this Court's holding in *Daniel* v. *Paul*, 395 U.S. 298 (1969) construing section 201(b)(3) of the Civil Rights Act of 1964?

3. Is a change of law a basis for setting aside a consent decree?

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STATUTES INVOLVED

The Civil Rights Act of 1964 (42 U.S.C 2000a et seq.)

"§ 201(a) (42 U.S.C. 2000a(a)O). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

§ 201(b) (42 U.S.C. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .:

. . .

(3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; . . .

. . .

§ 201(c) (42 U.S.C. 2000a(c)). The operations of an establishment affect commerce within the meaning of this title if . . .

(3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . . For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any state . . . ."

The Civil Rights Act of 1866 (42 U.S.C. 1981, 1982)

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as it

enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

STATEMENT OF THE CASE

Proceedings Below

The complaint was filed on October 6, 1965 under the Civil Rights Act of 1964 to compel this petitioner to admit Negroes to a picnic park operated by him in the Fairfax woods in Northern Virginia ('Timberlake'). After joinder of issue and discovery, all parties entered into a consent decree (App. p. 1a) approved by the District Court requiring petitioner to close his snack bar as a condition precedent to the continued operation of Timberlake.

Two years later, asserting that the *en banc* reversal in *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 343 (5th Cir., 1968) holding self-amusement to be 'entertainment' changed the law under which it had accepted the consent decree, the United States, as plaintiff-intervenor filed a "Motion for Further Relief" before the District Court to void its prior consent, set aside the earlier decree, and require admission of Negroes on the ground that the picnic area was a 'place of entertainment' which affected interstate commerce within the meaning of the Act.

The individual respondents then filed a motion for the same relief on the basis of this Court's decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968) charging that a denial of admittance to Timberlake was a denial of the right to contract under the Civil Rights Act of 1866.

All significant facts about Timberlake were stipulated or admitted in 1965, and no change of fact occurred thereafter except the closing of petitioner's snack bar under the consent decree.

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On July 10, 1969 the District Court (App. p. 4a) held that under the reservation of jurisdiction clause in the 1966 consent decree and "any other reason" clause of Rule 60(b)(6) of the Federal Rules of Civil Procedure, it had authority to revoke the existing consent decree and reverse the earlier determination without change of fact, and did so, sustaining the contentions of both respondents, adding that this Court's ruling in *Daniel* v. *Paul*, 395 U.S. 298 (1969) established Timberlake as a 'place of entertainment' under the 1964 Act. The Court of Appeals affirmed, finding Timberlake to be a "carbon copy of the Lake Nixon facilities the Supreme Court reviewed in *Daniel* v. *Paul*."

No pleading, opinion, or order of any Court or party relies on state action or constitutional grounds. Only the interpretation of the two statutes was considered and ruled on.

Facts

Timberlake is a privately owned and operated 23 acre picnic park in the Fairfax woods near Oakton, Virginia, 4 miles from the nearest interstate highway. It was built up by petitioner over a ten year period for use by families in the Washington area who have been customers during most of this period. It is not licensed by any governmental authority nor is any such license required.

It has picnic tables for eating, two small artificial lakes for swimming, 10 canoes for boating, 2 rafts and some used inner tubes for floating. Until closed by this suit, Timberlake was nothing more than a place to go to picnic and swim in the woods, a place whose principal activities were described by the District Court as "sunbathing and girl watching" (App. p. 5a). It was essentially the "purely local swimming hole" referred to in Mr. Justice Black's dissent in *Daniel* v. *Paul*.

The largest amount of advertising done by Timberlake was the placing of four 4 x 5 inch ads in the Washington

Sunday Star in a single year. There are no brochures, no roadside billboards, no radio or television, or any other advertising except word of mouth.

Timberlake had no mechanical rides, skating rinks, spectator stands, paddle boats, miniature golf course, juke box, dance floor, nor, after the consent decree, did it serve any food or drink items.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE RIGHT

1. This petition brings before this Court for the first time since the *Civil Rights Cases*, the application of the 1866 Civil Rights Act to the making of contracts by individuals. The question of the continued validity of this Courts earlier ruling, that the statute did not eliminate individual freedom to select customers, was specifically put aside in *Jones* v. *Mayer*, 392 U.S. 409 (1968) (ftn. 78, p. 441). Because of the almost unlimited applicability of the word 'contract' in law, an early decision on this point is of the utmost practical importance.

2. This petition also presents the question of whether there is any excepted *de minimis* situation under the 1964 Civil Rights Act coverage, or whether as Mr. Justice Black feared, it is to be extended to the "every little remote country place of recreation" (395 U.S. 298 at 315). Determination of the limits involved is important to the continued operation under the statute of the hundreds or thousands of similar picnic areas.

3. The reopening and reversal of a civil rights consent decree without any intervening change of fact, is contrary to precedent in this Court and in the Circuits and affects the day to day administration of the federal courts to such a degree that its early resolution by this Court would be desirable.

ARGUMENT

I

Absent a Statutory Prohibition, Petitioner May Select His Own Customers

Apart from such prohibitions as Congress may enact under the authority of Sec. 2 of the Thirteenth Amendment, the petitioner would have an absolute right to select his own customers and could make such selection on any basis, whether his own or the associational preferences of his patrons. It was so provided at common law; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (2d Cir., 1915) adopting from *Cooley on Torts* the statement,

> "It is part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

That ruling was in turn cited with approval by this Court in *Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, and by the District Court here involved in *United States* v. *Colgate & Co.*, 253 Fed. 522 (E.D. Va., 1918), aff. 250 U.S. 300 (1919).

Nor is the private right to discriminate limited by the Constitution; *Shelley* v. *Kraemer*, 334 U.S. 1, 69 S.Ct. 836 (1948). In *Peterson* v. *City of Greenville, South Carolina*, 373 U.S. 244, 83 S.Ct. 1119 (1963) this Court stated:

> "It cannot be disputed that under our decision 'private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it."

And the Circuit below, prior to the 1964 Civil Rights Act, repeated this principle in the series of cases by

Williams against the *Howard Johnson's* restaurant in Alexandria (e.g., 210 F.Supp. 295; 268 F.2d 845; 342 F.2d 727 (4th Cir. 1965), cert. den. 382 U.S. 814).

Accordingly, petitioner was free to limit admission to Timberlake as requested by his patrons unless prohibited by statute.

II

The Civil Rights Act of 1866 Does Not Prohibit Private Discrimination in Picnic Park Admissions

The Civil Rights Act of 1866 (42 U.S.C. §§ 1981, 1982) provides in § 1981 that all persons shall have the same right to make and enforce contracts, to sue, and to benefit from laws for the "security of persons and property" as "is enjoyed by white citizens." As noted in the prior point, the common law then existing was that no "white citizen" had a legal right to demand admittance to a privately run facility like Timberlake.

42 U.S.C. § 1982 grants the further right to all persons,

> "To inherit, purchase, lease, sell, hold, and convey real and personal property."

The Fourth Circuit, in the ruling here complained of, cited (App. p. 15a) two decisions of this Court under § 1982, *Jones* v. *Mayer*, 392 U.S. 409 (1968) and *Sullivan* v. *Little Hunting Park, Inc.*, —— U.S. ——, 90 S.Ct. 400 (1969), from which it concluded,

> "The provision invoked in this case, § 1981, the sister to § 1982, must be construed in similar broad fashion."

and held accordingly that § 1981 creates an obligation of non-discrimination in every private commercial transaction—such as an admission to Timberlake—which the law would define as a contract. So interpreted, the statute would necessarily apply to every non-social event between individuals since,

> "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." Marshall, Ch. J. in *Sturges* v. *Crowinshield*, 4 Wheat. 122 (1819).

It would apply to every privately organized or owned church, club, school or other organization having a supporting membership and would reduce Title II of the 1964 Civil Rights Act to an unnecessary *pro tanto* restatement.

Petitioner submits that neither this Court nor any circuit has ever before so held, and the reliance on this Court's decision in *Jones* v. *Mayer* is unjustified. In that case, the potential scope of § 1981 as depriving individuals of their common law right to select their own customers was discussed in footnote 78 (392 U.S. 409 at 441) quoting from the *Civil Rights Cases*, 109 U.S. 3 (1883), that:

> "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."

This Court there noted that the continued validity of this position might be open to question, but that the problem had been rendered "largely academic" by the passage of Title II of the Civil Rights Act of 1964—the statute under which this action was originally brought.

In short, therefore, *Jones* v. *Mayer* either leaves the question open or reaffirms the absence of any prohibition under § 1981 against private acts of discrimination—except as to the activities defined by the Congress under the 1964 Act.

The other cases cited (App. p. 15a) by the Fourth Circuit involve either state enforcement action, *Valle* v.

Stengel, 176 F.2d 697 (3rd Cir. 1949)*, and *Williams* v. *Kansas City*, 104 F.Supp. 848 (W.D. Mo. 1952) aff'd 205 F.2d 47 (8th Cir. 1953) cert. den. 346 U.S. 826 (1953), or a quasi-public institution—a hospital and a labor union—*United States* v. *Med. Soc. of So. Car.*, 298 F.Supp. 145 (D.S.C. 1969) and *Dobbins* v. *Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968).

Petitioner submits that the interpretation by the lower court of 42 U.S.C. § 1981 to prohibit the arbitrary denial of admission to a non-licensed privately owned picnic park was error and that if any such limitation exists, it must be found in the 1964 Act.

III

The Timberlake Picnic Park is Not a 'Place of Exhibition or Entertainment' Under the 1964 Civil Rights Act

The Fourth Circuit (App. p. 14a) accurately summarized the requirement of proof under this statute:

> "Section 201(a) of Title II of the 1964 Civil Rights Act prohibits discrimination in public accommodations. An establishment is a 'public accommodation' if its operations 'affect commerce' (§ 201(b)) and if it is a 'place of exhibition or entertainment' (§ 201(b)(3)). Such a place of entertainment does affect commerce if 'it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce. (§ 201(c)(3))."

There are then two fundamental inquiries, (a) does Timberlake customarily present a source of entertainment which (b) moves in commerce.

As to the question of the coverage of 'sources of entertainment', the 1964 Civil Rights Act is specific. It

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* The Third Circuit in *Valle* pointed out that the case did not involve ". . . refusal . . . of accommodations of . . . a place of public amusement by an individual . . ." (p. 703)

was drafted to cover certain activities and exclude others. The Tenth Circuit, analyzing the Act in *Cuevas* v. *Sdrales*, 344 F.2d 1019 (1965) referred to the testimony on this point of Attorney General Kennedy;

> "The coverage was quite explicit. We did not include other establishments which were constitutionally within the reach of federal regulation . . . because we felt that—given a solution to the major problems—removal of these discriminatory practices could be voluntarily induced. We are reluctant to extend federal power beyond those areas where it was clearly needed to meet existing problems.
>
> —Hearings, House Jud. Comm. on H.R. 7152 as am., 88th Cong. 1st Sess., pp. 2655-56."

Senator Humphrey supporting the bill in the Senate agreed

> "The reach of that Title [II] is much narrower than when the bill was first introduced. It is also narrower than S.1732 . . .
>
> . . .
>
> . . . Unless we want to legislate for the whole economy, a line has to be drawn some place, and the bill does it in a sensible place.
>
> (110 Cong. Rec. 6533, March 30, 1964)

Referring to places of "exhibition or entertainment" Senator Kuchel described for the supporters of the bill the adverse effect on interstate commerce sought to be corrected:

> "The market for national entertainment such as community concerts, athletic competitions and motion pictures is surely restricted by such a local situation."
>
> (110 Cong. Rec. 6557, March 30, 1964)

It seems reasonably clear that sunbathing and girl watching are not "national entertainment" in the sense

described by the Senator. The distinction between such self-amusement and statutory 'entertainment' was explained in the "Additional Majority Views on the Bill" of Rep. R. W. Kastenmeier (H. Rep. No. 914, 88th Cong., Second Sess., 1964; Cong. and Adm. News, 1964, page 2410)

> "Discrimination is prohibited in . . . places of entertainment and spectator sports. . . . The bill would allow discrimination to continue in . . . bowling alleys and other places of recreation and participation sports, unless such places serve food."

This intended distinction was affirmed in examples given by the Senate debate captain, Sen. Magnusson

> "The following establishments would therefore, be generally exempt . . . Dance studios, bowling alleys and billiard parlors."
>
> (110 Cong. Rec. 7407, April 9, 1964)

Each exempt activity so named by the Senator is a 'recreation and participation sport', a form of self-amusement not customarily lacking informal spectators. And the distinction of such lookers-on from the concept of a paying non-participating spectator is emphasized in the statutory language requiring that the entertainment be 'presented', a transitive verb having the connotation of taking affirmative action to place entertainment before passive spectators. Clearly, whatever statutory validity sunbathing and girl-watching might otherwise have as a 'source of entertainment,' they are not 'presented' by the petitioner.

It is true that this Court in *Daniel* v. *Paul*, *supra*, adopted the self-amusement interpretation in *Miller* v. *Amusement Enterprises, Inc.*, *supra*, as "entertainment" under Title II, and referred to the "recreational areas" phrase in the February 29, 1963, civil rights message of President Kennedy (395 U.S. 298, at 306). But that message was not referring to the 1964 Civil Rights Act,

the final form of which did not come into existence until more than a year later in a 56 page mimeographed substitute offered by Congressman Celler (Cong. and Adm. News, 88th Congress, Second Sess. 1964, pp. 2415, 2483) to which had been added the limitations on coverage referred to by the Attorney General and the Congressional leaders. And, it would be difficult at this point to evaluate the extent to which these limitations were instrumental in securing a majority acceptance for the close and long-delayed passage of this legislation.

Finally, on the law, in both the *Daniel* and *Miller* situations, a covered eating establishment included in the premises of "Lake Nixon" and "Fun Fair" created explicit jurisdiction under the 1964 Act, without any necessity for the invoked 'place of entertainment' coverage. On the facts, as two large commercial amusement areas advertising continually on radio and television they had nothing in common with Timberlake either as to the interstate character of its activity or by comparison with the four 4″ x 5″ annual advertisements in the Star.

The second requirement of the statute is that the specified sources of entertainment shall move in commerce. Such involvement in commerce is essential since petitioner, by serving persons who may have moved interstate, does not thereby engage himself in commerce, *Williams* v. *Howard Johnson's*, 268 F.2d 875 (4th Cir. 1969), *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 169 (8th Cir. 1959) and cases cited.

The two 'sources of entertainment' moving in commerce, as given by the Fourth Circuit, were the patrons themselves and Timberlake's recreational equipment. As to the former it must be conceded that any picnicking by local citizens in the Washington area would imply the presence of persons from the District of Columbia and the Maryland and Virginia suburbs. But interstate movement in a single locality on a social occasion is not 'travel' in any sense of 'commerce'. This Court noted

that even professional spectator sports and shows were 'local affair[s]' although their commercial management was not, *United States* v. *Int'l Boxing Club of N. Y.*, 348 U.S. 236, 241 (1954).

> "When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions."
>
> *Polish Nat. Alliance* v. *NLRB*, 322 U.S. 643, 650 (1944)

We submit that as a matter of practical judgment, a family drive across the Potomac River to picnic in the Fairfax woods cannot reasonably by interpreted as a movement in "commerce".

Both Courts below also refer to "recreational equipment and apparatus originating out of the state" as sources of entertainment which move in commerce. In a single purchase 10 years ago, petitioner ordered 10 canoes from a Sears Roebuck store in Washington, D. C. No other fact of any character bears on any interstate movement of equipment at Timberlake.* The picnic tables are home made, the inner tubes are obtained locally, the two rafts were made of local timber by petitioner and his sons. The District Court also referred to some sun umbrellas which may have been bought outside of Virginia, but the record is silent. We respectfully submit that a ten year old transaction in 1960 is not a continuing movement "in commerce" of the items so purchased.

Timberlake is not a place of entertainment within the definition of the Civil Rights Act of 1964, and accordingly is not a place of public accommodation subject to the terms of Title II of that statute.

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* On the retrial, the District Court ignored petitioner's offer to stop advertising and dispose of the canoes. (Rec. Letter June 5, 1969)

IV

It Was Patent Error to Revoke an Existing Consent Decree Absent Some Change of Fact

The 1966 consent decree of the District Court was a final order. *May* v. *Moss*, 194 F.2d 133 (8th Cir. 1952). And the only reserved jurisdiction in that decree was:

> ". . . for the purpose of enforcing this injunction . . .". (App. p. 2a)

Yet, the District Court in 1968 stated (App. p. 6a) without further explanation:

> ". . . the Court in its Order of 1966 expressly retained jurisdiction. Even if it had not so done, Rule 60(b)(6) of the Federal Rules of Civil Procedure would permit the Court to grant the additional relief requested upon proper showing."

First, we submit that a reservation of jurisdiction to *enforce* "this injunction" is not a general reservation of future jurisdiction to *reverse* "this injunction" and then to retry the case *de novo* on the same facts. Second, there was no "additional relief" requested. The only relief requested on the retrial was the same relief requested under the original complaint in 1965. Third, while the language of Rule 60(b)(6) allows the setting aside of a final order for

> ". . . (6) any other reason justifying relief from the operation of the judgment."

it has been repeatedly held as to this clause that a change of law is not such a reason

> "It is quite clear that in extraordinary situations, relief from final judgments may be had under Rule 60(b)(6), when such action is appropriate to accomplish justice. *Klapprott* v. *United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. A change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance

which justifies such relief. *Ackermann* v. *United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207; *Berryhill* v. *United States*, 6 Cir. 199 F.2d 217.

'Litigation must end some time, and the fact that a Court may have made a mistake in the law when entering a judgment, or that there may have been a judicial change in the Court's view of the law after its entry, does not justify setting it aside. *Sunal* v. *Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; *Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 42 S.Ct. 196, 66 L.Ed. 475; *Elgin Nat. Watch Co.* v. *Barrett*, 5 Cir. 213 F.2d 776; *Berryhill* v. *United States*, 6 Cir. 199 F.2d 217; *United States* v. *Kunz*, 2 Cir., 163 F.2d 344." *Collins* v. *City of Wichita*, 254 F.2d 837, (10 Cir. 1958).)

Accord, *Title* v. *United States*, 263 F.2d 31 (9th Cir. 1959); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945); *Safeway Stores, Inc.* v. *Coe*, 136 F.2d 771 (D.C. Cir. 1943).

We respectfully submit that the District Court's grounds for asserting jurisdiction were without basis either in the earlier decree as entered or in the Federal Rules as cited.

CONCLUSION

The issues here involved are of major proportion in the determination of the future applicability of the Civil Rights Acts, and of decrees entered in such cases. A writ of certiorari should be directed to the United States Court of Appeals for the Fourth Circuit to review the decision.

Respectfully submitted,

GEO. STEPHEN LEONARD
1725 K Street, N.W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

LARUE VAN METER
207 Park Avenue
Falls Church, Virginia 22046

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Plaintiff,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Acting Attorney General,

Plaintiff-Intervenor,

v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Defendant.

CONSENT DECREE

The parties having stipulated and agreed that the defendant owns and operates a recreational facility at Oakton, Virginia, known as Timberlake, and that there is located on the premises of Timberlake an eating establishment, and all of the parties having consented to the entry of this Order,

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that, for so long as there is located on the premises of the recreational facility known as Timberlake the eating establishment heretofore maintained and operated thereon or any other place of public accommodation as defined in Title II of the Civil Rights Act of 1964, 42 U. S. C. 2000a *et seq.*, the defendant Joseph S. Young, his agents, successors, employees and all those in active concert or participation with him are hereby enjoined and restrained from any of the following:

1. From denying the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake to members of the Negro race or to any other persons on account of race, color, religion or national origin.

2. From doing any thing, directly or indirectly, that may tend to hinder or interfere with the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake by members of the Negro race or any other persons on account of race, color, religion or national origin.

3. From failing or refusing to post and to keep posted permanently, at the entrance to Timberlake, in a conspicuous place easily visible to and readable by any person entering Timberlake, and in a conspicuous place at or near the eating establishment, a notice, stating as follows: "Notice, Timberlake is a place of public accommodation under the Civil Rights Act of 1964. All of its facilities are open to all persons on an equal basis regardless of race, color, religion or national origin."

This Court retains jurisdiction of the subject matter of this cause and of the parties for the purpose of enforcing this injunction as may be necessary or desirable.

No attorney's fees are awarded. Court costs in the amount of $34.60 are assessed against the defendant.

This the 5th day of December, 1964.

/s/ OREN R. LEWIS
United States District Judge

The undersigned consent to
the entry of this Order:

/s/ Robert M. Alexander
ROBERT M. ALEXANDER
Attorney for Plaintiff

/s/ C. V. Spratley, Jr.
C. V. SPRATLEY, JR.
United States Attorney

/s/ Frank E. Schwell
FRANK E. SCHWELL
Attorney, Department
of Justice

/s/ Leonard E. Ryan
LEONARD E. RYAN
Attorney, Department
of Justice

/s/ LaRue Van Meter
LARUE VAN METER
Attorney for Defendant

A True Copy, Teste:

W. FARLEY POWERS, JR.
Clerk

By /s/ Betty Dodson
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, ETC.,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,
Defendant.

MEMORANDUM OPINION

A consent decree was entered herein on December 5, 1966 enjoining the defendant, his agents, successors, employees and all those in active concert or participation with him from denying the full and equal enjoyment of all the goods, services, facilities, privileges, advantages and accommodations of Timberlake to members of the Negro race or to any other person on account of race, color, religion or national origin for so long as there remained located on the Timberlake premises the eating establishment previously maintained and operated by the defendant. Jurisdiction of the subject matter was retained by the Court.

Subsequently the defendant closed his eating facility and continued his racially discriminatory admission policy.

In August 1968 the United States filed a motion for further relief alleging that the defendant's policy of excluding non-white patrons from Timberlake violated § 201(b)(3) of the Civil Rights Act of 1964, contending

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that Timberlake is a place of "entertainment" as defined therein.

Shortly thereafter the original plaintiff filed a motion for further relief contending that defendant's racially discriminatory admission policy at Timberlake violated 42 U.S.C. §§ 1981 and 1982 as those provisions were construed by the Supreme Court of the United States in Jones v. Mayer Company, 392 U.S. 409 (1968).

Both plaintiffs seek further injunctive relief.

The defendant first contends that the Court ought not to entertain the plaintiffs' motions because he has not violated the December 5th injunction—hence there is nothing pending before the Court for adjudication. The defendant further contends that Timberlake is not a place of entertainment as that word is used in the 1964 Civil Rights Act and that it is not within the scope of the Civil Rights Act of 1866.

The facts are not in dispute. They were fully developed by interrogatories and by exhibits filed herein.

Timberlake is a privately owned parcel of land located near Oakton, Virginia—approximately fifteen miles from the District of Columbia and the State of Maryland. The facility in question covers about twenty-three acres and includes two lakes used for swimming, diving, canoeing, fishing, picnicking and sunbathing. It is open to the general public from mid-May through mid-September. It attracts about sixty-five thousand persons per season and grosses about $50,000.00.

There are several floats or rafts located in the lakes, some of which have diving boards. Canoes may be rented by the hour. Inner tubes may be rented by the day. Although equipment therefor is not rentable, patrons may and do use the lakes for fishing and scuba or snorkel diving. The sandy beaches are used, among other things, for sunbathing and girl-watching activities. Umbrellas

are available for rent on a daily basis. There are numerous picnic tables located at various places around the lakes which are rented to patrons—the patrons bring their own food and beverages—none is sold on the premises.

Admission fees are a dollar and a quarter for adults and fifty cents for children, with ninety per cent of the gross receipts coming from admissions.

Most of the patrons reach Timberlake by automobile. Although most come from Virginia, many come from Maryland, the District of Columbia and other states. Road signs are located in Virginia near interstate routes indicating the direction to Timberlake.

The defendant has advertised Timberlake in the Washington Evening Star on several occasions. This newspaper uses the United States mail facilities and is circulated generally in Metropolitan Washington.

The canoes and umbrellas were purchased from merchants in the District of Columbia.

Timberlake is and has been operated on a racially segregated basis at least since the effective date of the Civil Rights Act of 1964. Admission is secured through the admission booth upon paying the requisite fee. White members of the general public are routinely admitted. Negroes and other non-white persons are refused admission.

The defendant's contention that this Court lacks jurisdiction to entertain plaintiffs' motions is without merit. The Court in its order of 1966 expressly retained jurisdiction. Even if it had not so done, Rule 60(b)(6) of the Federal Rules of Civil Procedure would permit the Court to grant the additional relief requested upon proper showing.

The Court finds that Timberlake is a place of entertainment within the meaning of § 201(b)(3) of the Civil

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Rights Act of 1964 and is thereby subject to the proscription of Title II of the Act—Timberlake provides recreational or other activities for the amusement or enjoyment of its patrons. See Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (1968).

The dictionary defines the word "entertainment" as the act of diverting, amusing or causing someone's time to pass agreeably. The services and facilities offered at Timberlake clearly fall within that definition. To hold that Timberlake is not a place of entertainment within the meaning of § 201(b)(3) of the Civil Rights Act of 1964 would violate the basic canon of statutory construction that words are presumed to be used in their ordinary sense.

Further reference is made to Daniel v. Paul, decided by the Supreme Court of the United States on June 2nd of this year. That decision makes it clear that Timberlake is a place of entertainment as that word is used in the Civil Rights Act of 1964.

The facts here found further clearly establish that the operation of Timberlake affects commerce within the meaning of § 201(b)(3) of the Civil Rights Act of 1964. Timberlake makes itself available to all members of the general public. It is conceded that persons using the facilities at Timberlake travel on interstate highways in reaching the facility and that a substantial number cross state lines to get there. Further, Timberlake has in the past advertised in a newspaper having general circulation in Metropolitan Washington and these advertisements point out that Timberlake is easily accessible from the Capital Beltway.

It should be further noted that some of the equipment rented to the patrons was purchased for stores located in the District of Columbia.

From a reading of Jones v. Mayer Company, 392 U.S. 409, recently decided by the Supreme Court of the United

States (1968), it would appear that the defendant's racially discriminatory admission policy deprives the plaintiff of the rights secured by 42 U.S.C. § 1981. That section on its face prohibits all private racially motivated conduct which denies or interferes with the Negro's right to enter into contracts to purchase that which is freely sold to white citizens. It is clear that under common law principles a ticket to a place of entertainment or recreation is regarded as a contract. That was the holding in Valle v. Stengel, 176 F.2d 697 (3rd Cir. 1949).

The relief prayed for by the plaintiffs will be granted.

The attorneys for the plaintiffs should prepare an appropriate order, present it to counsel for the defendant for approval as to form, and then to the Court for entry.

The Clerk will send copies of this memorandum opinion to *all* counsel of record.

/s/ OREN R. LEWIS
United States District Judge

July 10, 1969

A True Copy, Teste:

W. FARLEY POWERS, Jr.
Clerk

By /s/ Betty Dodson
Deputy Clerk

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 3850

ADA M. SCOTT, ETC.,
Plaintiff,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,
Defendant.

ORDER

The Court having held in its Memorandum Opinion of July 10, 1969, that it had jurisdiction to entertain plaintiffs' motions for further relief and having held that Timberlake is a "place of entertainment" which affects interstate commerce within the meaning of § 201(b)(3) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(b)(3), and that defendant's racially discriminatory admission policy deprives Negroes of the rights secured by 42 U.S.C. § 1981.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Joseph S. Young, together with his agents, employees, successors in interest and all persons in active concert or participation with him or them be, and each is hereby permanently enjoined from

(1) Refusing to admit Negroes and other non-white persons to all facilities of Timberlake upon the same basis and under the same conditions as white members of the general public are admitted to the various facilities of Timberlake;

(2) Failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of Timberlake available to Negroes and other non-white persons upon the same basis and under the same conditions as they are made available to white members of the general public;

(3) Otherwise failing or refusing to make any of the goods, services, facilities, privileges, advantages or accommodations of Timberlake available to Negroes and non-white persons upon the same basis as they are made available to white members of the general public; and

(4) Engaging in any act or practice which deprives, or is intended to deprive, directly or indirectly, any person of the right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of Timberlake without discrimination or segregation on the ground of race or color.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant shall cause to be posted, within ten days following service of this Order upon him, and shall keep posted through October 1, 1970, at the entrance of the Timberlake facility the following notice: "TIMBERLAKE IS OPEN TO ALL MEMBERS OF THE PUBLIC WITHOUT REGARD TO RACE OR COLOR." Said notice is to be prominently posted on the front of the admission booth to Timberlake in such a position that it is clearly visible to all patrons and potential patrons. It shall be of sufficient size and lettering so as to be easily readable by all patrons and potential patrons.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, in the event defendant advertises Timberlake in any newspaper of general circulation in the Washington, D. C., metropolitan area, he shall cause

to be inserted in all such advertisements, through October 1, 1970, the following notice: "TIMBERLAKE IS OPEN TO ALL MEMBERS OF THE PUBLIC WITHOUT REGARD TO RACE OR COLOR." Such notice shall be of sufficient size and lettering so as to be easily readable by all persons.

AND IT IS FURTHER ORDERED that the United States Marshal forthwith make personal service of a certified copy of this Order on defendant and duly file his Return of Service with the Clerk of this Court. In the event that defendant shall, within ten days of the date of such service upon him, file with the clerk of this Court a notice of appeal and promptly prosecute the same, this Order shall be stayed pending further determination by the Court of Appeals.

The Court retains jurisdiction of the subject matter of this cause and of the parties.

Ordered this ..... day of July, 1969.

/s/ OREN R. LEWIS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,814.

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Appellees,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Intervenor,

versus

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued November 6, 1969 Decided January 16, 1970.)

Before SOBELOFF, WINTER and BUTZNER, Circuit Judges.

LaRue Van Meter for Appellant; John Bleveans, Attorney, Civil Rights Division, Department of Justice, (Jerris Leonard, Assistant Attorney General, David L. Norman, Deputy Assistant Attorney General, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Intervenor United States of America, and Allison W. Brown, Jr., (Robert M. Alexander on brief) for Appellee.

SOBELOFF, Circuit Judge:

Timberlake is a privately owned recreational facility in Fairfax County, Virginia, that is open to the white public upon payment of an admission fee, but excludes black and other non-whites.

It covers about 23 acres and encompasses two lakes for swimming, diving, canoeing, fishing, sunbathing and picnicking. There are several floats or rafts in the lakes. Canoes, inner tubes, umbrellas and picnic tables may be rented. No food or beverage is sold on the premises. Admission to Timberlake is $1.25 for adults and 50 cents for children. The establishment is open from mid-May through mid-September, during which time it accommodates about 65,000 persons and grosses about $50,000. Ninety percent of the gross receipts comes from admission charges; the remainder is from rentals. Located approximately 15 miles from the District of Columbia and from Maryland, many of its patrons come by automobile from these localities. Timberlake road signs are planted near interstate routes. Canoes and umbrellas used at Timberlake were purchased in Washington, D.C. The enterprise has advertised in the *Washington Evening Star.*

Suit was originally instituted in 1965. A consent decree, based on Title II of the 1964 Civil Rights Act, was entered on December 5, 1966, enjoining defendant from further discrimination. The judgment, however, was founded on the presence at that time of an eating facility within Timberlake. Subsequently the eating facility was closed and the discriminatory policy was continued.

In August and September 1968 plaintiffs moved in the District Court for further relief and for renewal of the original injunction. The motion was prompted by judicial developments in the interpretation of the Civil Rights

Acts of 1964 and 1866. The District Court granted the requested relief and defendant appeals.

I

Civil Rights Act of 1964 (42 U.S.C. 2000a)

Section 201(a) of Title II of the 1964 Civil Rights Act prohibits discrimination in public accommodations. An establishment is a "public accommodation" if its operations "affect commerce" (§ 201(b)) and if it is a "place of exhibition or entertainment" (§ 201(b)(3)). Such a place of entertainment does affect commerce if "it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." (§ 201(c)(3)).

The District Court found that Timberlake is a place of entertainment and that its operations affect commerce. Except that it is smaller in scale, Timberlake is a virtual carbon copy of the Lake Nixon facilities the Supreme Court reviewed in *Daniel* v. *Paul*, 395 U.S. 298 (1969). In that case the Court ruled that a recreational area—in which patrons are not passive spectators but direct participants—is a "place of entertainment" within the meaning of § 201(b)(3). The Supreme Court also concluded in *Daniel* that recreational equipment and apparatus originating out of the state constituted "sources of entertainment which move in commerce" for the purposes of § 201(c)(3). The Court specifically approved *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (1968), in which the Fifth Circuit held that patrons themselves, who entertain other patrons by their activity, are "sources of entertainment." Both types of sources, stemming from points beyond the Virginia borders, are found at Timberlake. Accordingly, the District Court's conclusion that Timberlake is within the ambit of the 1964 Act is clearly correct.

II

Civil Rights Act of 1866 (42 U.S.C. 1981)

42 U.S.C. 1981 provides that

> all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts * * * as is enjoyed by white citizens * * *.

In *Jones* v. *Mayer*, 392 U.S. 409 (1968), the Supreme Court dealt with 42 U.S.C. 1982, which is derived from the same clause of the 1866 Act (14 Stat. 27). The Court declared that the Act, which guarantees blacks the right to "purchase [and] lease * * * real and personal property," prohibited a private developer from refusing to sell a house to a Negro. Recently, the same statute was applied to the conveyance of a lease coupled with the right to use a swimming pool. *Sullivan* v. *Little Hunting Park, Inc.*, U.S. (38 USLW 4059) (Dec. 15, 1969). The provision invoked in this case, § 1981, the sister to § 1982, must be construed in similar broad fashion.

The Timberlake proprietors bestow the right of admission in return for a fee. This is unquestionably a contract. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636 (1913) (Holmes, J.); *Watkins* v. *Oaklawn Jockey Club*, 86 F.Supp. 1006, 1016 (W.D. Ark. 1949), *aff'd*, 183 F.2d 440 (8th Cir. 1950); *W. M. V. Co.* v. *Black*, 113 Va. 728, 75 S.E. 82 (1912). Refusal to extend the same contractual opportunity to blacks is, as the District Court decided, a violation of 42 U.S.C. § 1981. *Valle* v. *Stengel*, 176 F.2d 697 (3rd Cir. 1949); *United States* v. *Medical Society of South Carolina*, 298 F. Supp. 145, 152 (D.S.C. 1969); *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 442 (S.D. Ohio 1968); *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo. 1952), *aff'd*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826 (1953).

III

Plaintiff, Ada Scott, has moved under 42 U.S.C. 2000a-3(b) for allowance of attorney fees for this appeal. The motion is granted and the case is remanded to the District Court to determine the amount.

Affirmed and Remanded.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,814.

ADA M. SCOTT, for herself, for her daughter, JACQUELYNNE A. SCOTT, an infant, and for others similarly situated,

Appellee,

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Intervenor,

versus

JOSEPH S. YOUNG, d/b/a TIMBERLAKE,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof it is here ordered and adjudged by this Court that the judgment of said District Court appeal from in this cause be, and the same is hereby, affirmed; and the case is remanded to the U. S. District Court for the Eastern District of Virginia at Alexandria to determine the amount of attorneys fees for this appeal. This is a certified copy.

/s/ SAMUEL W. PHILLIPS
SAMUEL W. PHILLIPS
Clerk
Attest to Being True Copy

/s/ MARGARET M. WALTON
MARGARET M. WALTON
Deputy Clerk

Filed: January 16, 1970